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Joint Opinion of the United States

October Term 1953

Robert A. McLaughlin, Petitioner

United States of America

Respondent

and

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 566

ROBERT A. McALLISTER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of New York (R. 426-430) is not reported. The opinion of the Court of Appeals for the Second Circuit (R. 446-449) is reported at 207 F. 2d 952.

JURISDICTION

The judgment of the Court of Appeals was entered on November 12, 1953 (R. 449). A petition for rehearing and alternative relief was denied December 3, 1953 (R. 462-463). The petition

for a writ of certiorari was filed on February 2, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals was correct in reversing the decision of the District Court on the ground that even if the United States were negligent in permitting certain conditions to exist on its merchant vessel petitioner failed to prove that such negligence was the proximate cause of his contracting poliomyelitis.

STATEMENT

This case involves a libel brought by Robert A. McAllister, petitioner here, against the United States under the Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U. S. C. 741 *et seq.*, to recover damages alleged to have resulted from the negligence of the master and crew of the S. S. *Edward B. Haines*, a War Shipping Administration operated Liberty ship, in creating or permitting conditions conducive to the transmission of poliomyelitis on board the vessel and for failure to provide adequate treatment for the petitioner after he contracted the disease.

Petitioner signed on the *Haines* at New York as Second Assistant Engineer on July 23, 1945 (R. 431); the vessel sailed with a military cargo consigned to the Far East, and arrived at Shanghai September 26, 1945. There she remained until November 1, 1945, when she sailed for Hong Kong, arriving there November 5, 1945. She

stayed at Hong Kong until November 7, 1945, when she left to return to Shanghai, arriving at the latter port on November 11, 1945, and remaining there until November 23, 1945 (R. 431, 432).

The Master of the *Haines*, having been warned that poliomyelitis and other contagious diseases were prevalent in the port of Shanghai and other Asiatic ports of call, caused notices to be posted aboard ship, warning the crew of the existence of those diseases and cautioning them to exercise care in eating and drinking and to avoid association with the inhabitants ashore (R. 431). On several occasions the Master mustered the crew and personally warned them to the same effect (R. 432). Petitioner testified that he went ashore at Shanghai a number of times between September 26 and November 1 (R. 163, 165), but that he did not go ashore while at Hong Kong nor at Shanghai after the *Haines* returned there on November 11, 1945 (R. 165).

During the vessel's second stay in Shanghai, trucks for the Chinese Nationalist Army were loaded on board with the help of Chinese coolies and Chinese soldiers and mechanics were taken aboard to be transported to Tsingtao (R. 432). The Master expressly warned members of the crew against associating with the Chinese (R. 163) and separate toilet facilities were provided by the ship for the Chinese who came aboard (R. 432). These facilities consisted of a tem-

porary trough extending over the ship's side with running water supplied by a hose laid on the deck (R. 432). Petitioner testified that he never used those facilities (R. 83) but that because the hose was turned off he was required on one or two occasions to go up on deck and open the valve (R. 82-3). The district court found that no arrangements were made to keep the Chinese on board from using the ship's regular toilet facilities (R. 432), that the Chinese did use the crew's toilet facilities, and that they also used a common drinking fountain on deck (R. 432).

The *Haines* left Shanghai for Tsingtao on November 23, 1945, arriving there November 25, 1945. While at sea, on November 24, petitioner first reported symptoms of illness to the Purser (R. 433), but voluntarily continued his duties until November 28, 1945, when he was relieved of duty and put to bed (R. 433). On December 1, he was removed from the ship and transferred ashore to the Marine Corps Hospital at Tsingtao. Still later he was removed to the Navy hospital ship U. S. S. *Repose*, where he was first diagnosed as a poliomyelitis case (R. 433) and thereafter was transported in several stages back to the United States.

On July 16, 1946, petitioner filed suit under the Jones Act, 38 Stat. 1185, 46 U. S. C. 688, against the Cosmopolitan Shipping Co., the Government's general agent for the vessel's shore-side business, whom he alleged to be his employer,

seeking damages for personal injuries caused by the disease (Pet. 4). In that action he alleged that his injuries were the result of the Master's negligence in creating conditions conducive to the transmission of polio on board the *Haines* and his failure to provide adequate treatment for petitioner after he contracted the disease. A jury returned a general verdict against Cosmopolitan Shipping Co. for \$100,000, which was affirmed on appeal by the Court of Appeals for the Second Circuit. *McAllister v. Cosmopolitan Shipping Co. Inc.*, 169 F. 2d 4. This Court granted certiorari and, without reaching the negligence issues, reversed the courts below on the ground that the relationship of employer and employee did not exist between Cosmopolitan Shipping Co. and the Master and crew so that it could not be held liable for their negligence, nor could an action under the Jones Act lie against the company. *Cosmopolitan Shipping Co. Inc. v. McAllister*, 337 U. S. 783.

After the reversal by this Court, petitioner first brought suit against the United States in the District Court for the Southern District of New York seeking to collect the amount of the verdict set aside by the Court in the *Cosmopolitan* case. The basis for that suit was that the jury's verdict in the *Cosmopolitan* case was *res judicata* against the United States as principal (R. 51). The district court sustained exceptions to the libel and dismissed it, holding that the

doctrine of *res judicata* was inapplicable. *McAllister v. United States*, 1951 A. M. C. 1373.

By the Act of December 13, 1950, c. 1136, 64 Stat. 1112, Congress amended the Suits in Admiralty Act so as to provide that, where a suit timely instituted against a general agent for the management of the business of a government vessel was dismissed solely because the improper party defendant was sued, an action against the United States might be brought within one year after the passage of the above Act. On July 5, 1951, petitioner brought the present action in the District Court for the Eastern District of New York pursuant to that provision (R. 3-12). The libel, as amended (R. 52-53), was treated by both lower courts as alleging that petitioner's contracting the disease and his resulting infirmity were caused by the negligence of the United States in that (a) the government permitted the poliomyelitis virus to be spread by the Chinese aboard the vessel so as to cause petitioner to become infected with the disease, and (b) that the Government's failure properly to treat petitioner caused his condition to become aggravated.¹

¹ Petitioner's libel (R. 3-12) originally sought maintenance and cure and claimed that the issue of the Government's negligence was *res judicata* in favor of the petitioner as a result of the jury verdict, affirmed on appeal, against the Government's general agent in the *Cosmopolitan* case (*McAllister v. Cosmopolitan Shipping Co.*, 169 F. 2d 4 (C. A. 2), reversed, 337 U. S. 783). These two claims were dropped at the trial (R. 52-3; 75).

Although the present case was tried on a different record from the prior case against Cosmopolitan Shipping Co. (see R. 394-395), the district court said it was "substantially the same proof" and quoted extensively from the Second Circuit's opinion in the prior case (R. 428). The district court in these circumstances found that the United States was negligent in permitting conditions to exist on shipboard "which were conducive to the transmission of polio", that petitioner was unduly exposed to infection from these conditions and that "it may reasonably be inferred from the evidence that libelant [petitioner] contracted polio on shipboard due to the negligence of respondent rather than having contracted it ashore" (R. 429). It found, however, that the Government was not negligent in its care and treatment of petitioner (R. 430). Judgment for petitioner was entered in the amount of \$80,000, plus costs (R. 435).

On appeal, the Court of Appeals for the Second Circuit, by a unanimous court (L. Hand, Swan, A. Hand, J. J.), reversed and dismissed the libel (R. 449). It agreed with the district court that there was no negligence in the treatment and care of petitioner (R. 448). However, the court found that it was not altogether clear that the action of the respondent taken with respect to the Chinese constituted negligence and questioned whether there was a legal duty which would force

respondent to maintain strict segregation or even further, keep the Chinese off the boat altogether.² But the court's holding was that, assuming the negligence which it found doubtful, the petitioner failed to sustain his burden of proving that the Government's negligence was the cause of the injury (R. 448). The court concluded that from the facts proven either of several conflicting inferences, on some of which respondent would not be liable, were equally permissible and the cause highly speculative, so that petitioner, as the party having the burden of proof, could not succeed (R. 449). It accordingly ordered the libel dismissed.

ARGUMENT

No question of general importance deserving this Court's review is presented by this case. All that is basically involved is that the court below—one of the most experienced appellate admiralty benches in the land—concluded that the district judge made certain findings of fact not supportable within the four corners of the record in the present case. As its opinion and the record both show, the court's reversal of the trial judge was neither arbitrary nor in defiance of the weight to

² In the court below, as in this Court, petitioner asserted that the trial judge found respondent negligent in bringing the vessel "into an epidemic area and in close proximity with carriers of poliomyelitis" and permitting "Chinese coolies and others from said epidemic area" freedom to come aboard and to mingle with the crew (Pet. 9).

which trial findings are properly entitled. We believe that the Court of Appeals' action was entirely correct, but whether or not that be so there is no occasion for reexamination by this Court since there was no departure from the appropriate standard for review by an appellate tribunal of a lower court's findings.

1. The Court of Appeals properly held that the district court's finding that petitioner contracted polio due to the Master's taking inadequate precautions regarding the Chinese aboard was "wholly speculative" (R. 448) and based on insufficient proof (R. 448), thereby constituting grounds for reversal by an appellate court. The result is the same whether the appeal in admiralty is in every sense a trial *de novo* (*Brooklyn Eastern District Terminal v. United States*, 287 U. S. 170, 176; *The Ernest H. Meyer*, 84 F. 2d 496 (C. A. 9)) or whether a court of appeals reviewing the findings of an admiralty judge is bound by restrictions analogous to the "clearly erroneous" standard imposed by Rule 52 (a), Rules of Civil Procedure. See *Farrell v. United States*, 167 F. 2d 781 (C. A. 2), affirmed, 336 U. S. 511; *Johnson v. Cooper*, 172 F. 2d 937 (C. A. 8); *Swenson v. The Argonaut*, 204 F. 2d 636 (C. A. 3); *Boston Ins. Co. v. Dehydrating Process Co.*, 204 F. 2d 441 (C. A. 1); *C. J. Dick Towing Co. v. The Leo*, 202 F. 2d 850, 853-854 (C. A. 5); *Petterson*

Lighterage and T. Corp. v. New York Central R. Co., 126 F. 2d 992 (C. A. 2).²

Examination of the record discloses the lack of any real basis for the district court's finding that the disease was caused by negligence on the Government's part (R. 448). Petitioner's own expert admitted that "we are not sure of where an individual gets his disease" (R. 125). No other members of the crew contracted polio (R. 320) although they, as well as petitioner, were subjected to the same conditions aboard ship alleged to be "conducive to the transmission" of the virus. There is admittedly no scientific proof that the polio virus is water-borne or carried by sewage (R. 124, 236, 367), the methods seemingly relied on by petitioner as the direct cause of his infection, and medical science has considerable evidence to indicate that the virus may be spread by flies (R. 366, 367). The method generally accepted by both petitioner's and the Government's expert witnesses as the most likely method for transmitting the virus was by direct contact with

² Both the district court and the court of appeals found that the care and treatment furnished petitioner on the *Haines* was proper and adequate and did not aggravate the disease (R. 433, 448), thereby obviating any claim for negligence on that ground. The record amply supports that finding. The two-court rule (*Goodyear Tire and Rubber Co. v. Ray-O-Vac Co.*, 321 U. S. 275; *Anderson v. Abbott*, 321 U. S. 349; *Camstock v. Group of Institutional Investors*, 335 U. S. 211, 214) extends to admiralty cases. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 98-99; *Just v. Chambers*, 312 U. S. 383, 385; *The Wildcroft*, 201 U. S. 378, 387.

a person having the virus, from secretions of the nose and throat (R. 103, 237). Yet, petitioner himself testified that he did not associate with the Chinese on board (R. 163).⁴

Furthermore, while the ship was in Far Eastern waters petitioner went ashore on numerous occasions patronizing various stores, movies, and restaurants (R. 21, 30, 82). Since, as his own medical expert testified, the incubation period of the polio virus is scientifically uncertain (R. 125; cf. R. 385), petitioner could have contracted the virus ashore before November 1, 1945 (R. 125). It is also quite possible, from petitioner's evidence, that he might have become infected not by Chinese with whom he had no direct contact aboard ship, but by crew members who had picked up the virus while ashore and become carriers of the disease.

In addition, it is significant that, in making its finding in the present case tried on a different record (R. 394-395), the district court nonetheless placed great reliance on the jury's verdict, affirmed in the previous case of *McAllister v. Cosmopolitan Shipping Co.*, 169 F. 2d 4, reversed on

⁴ As to the use of toilet facilities, which petitioner relies on, the Chinese were denied use of the regular toilet facilities and petitioner never used their deck toilet (R. 163). Although the district court found that the Chinese used the crew's toilet facilities (R. 432), there is no evidence whatsoever that any Chinese used the officer's toilet facilities (R. 203-204); petitioner, of course, was an officer and cannot be assumed to have used any other accommodations.

other grounds, 337 U. S. 783 (R. 428). But that verdict was on a different record and, as emphasized by the court of appeals (R. 448), the district court was in error when it relied on that verdict, although founded "on much the same facts we have here," to aid petitioner in establishing liability in the present case where a new record had been made. The jury's verdict in that case is not *res judicata* in the present case; one court has already specifically ruled against petitioner on that point. *McAllister v. United States*, 1951 A. M. C. 1373.⁵ Petitioner himself so conceded by amending his libel in this case so as to omit any question of *res judicata* (R. 50, 52), and by making a new record. Not only are the records in the *Cosmopolitan* case and the present case different, but, as was specifically pointed out here by the Second Circuit, in *Cosmopolitan* there was a general jury verdict based *either* on negligence in treatment and care *or* on negligence in creating conditions conducive to the transmission of polio, so that in affirming that decision it was impossible for the court of appeals to tell upon which theory the jury relied⁶ (R. 448). These considerations are fully controlling, aside from the critical distinc-

⁵ Moreover, the trial judge, as well as counsel, so agreed at the trial (R. 395).

⁶ *E. g.*, causation may have been present as to alleged negligence in treatment and care and not present in connection with the alleged negligence in creating conditions conducive to the transmission of the disease.

tion that, for purposes of review, the jury as the fact finding body in the *Cosmopolitan* case had much greater scope in reaching its result than would the judge in the present case.⁷

Petitioner's reliance on this Court's decision in the recent case of *Pope and Talbot v. Hawn*, 346 U. S. 406, to restrict an appellate court's review of an admiralty trial court's findings, is likewise misplaced. All that case holds is that in a civil action based on diversity jurisdiction brought by one private party against another private party, but grounded on maritime law, the applicable substantive rules of law are the same whether the suit is labeled "law side" or "admiralty side" on a district court's docket (346 U. S. at 411).⁸

⁷ The Seventh Amendment to the Constitution, as implemented by decisions of this Court, drastically restricts appellate review of jury findings. *Slocum v. New York Life Insurance Co.*, 228 U. S. 364; *Parsons v. Bedford*, 3 Pet. 433; *Losender v. Kurn*, 327 U. S. 645, 653. Under a "clearly erroneous" or analogous standard for reversal of a trial court's finding of fact, an appellate court's scope of review is more extensive. See e. g., *Sunders v. Leech*, 158 F. 2d 486, 487 (C. A. 5); *Actna Life Ins. Co. v. Kepler*, 116 F. 2d 1 (C. A. 8); *Gasifier Mfg. Co. v. G. M. Co.*, 138 F. 2d 197 (C. A. 8); *Fleming v. Palmer*, 123 F. 2d 749 (C. A. 1), certiorari denied *sub nom. Caribbean Embroidery Cooperative Inc. et al. v. Fleming*, 316 U. S. 662; *Manning v. Gagne*, 108 F. 2d 718 (C. A. 1).

⁸ Nor would the *Pope and Talbot* decision operate to dilute the well-established doctrine limiting the sovereign's amenability to suit to the particular conditions prescribed by statute. Under the Suits in Admiralty Act the United States has consented to be sued in admiralty with a judge as the finder of

2. The Second Circuit did not err in applying the long established rule, accepted by this Court, that in a case "where proven facts give equal support to each of two [or several] inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover." *Penna. R. Co. v. Chamberlain*, 288 U. S. 333, 339, and cases cited. See also *Patton v. Texas and Pacific Ry. Co.*, 179 U. S. 658, 663-64; *Stevens v. The White City*, 285 U. S. 195, 204; *United States F. and G. Co. v. Des Moines Nat. Bank*, 145 Fed. 273, 277-280 (C. A. 8); *Stirk v. Mutual Life Ins. Co. of N. Y.*, 199 F. 2d 874 (C. A. 10); *Liggett and Myers Tobacco Co. v. DeParcq*, 66 F. 2d 678 (C. A. 8); *United States v. Barry et al.*, 67 F. 2d 763 (C. A. 6); *Bonner v. Texas Co. et al.*, 89 F. 2d 291 (C. A. 5); *Appalachian Electric Power Co. v. N. L. R. B.*, 93 F. 2d 985 (C. A. 4); *N. L. R. B. v. Union Pac. Stages*, 99 F. 2d 153 (C. A. 9).

As we have pointed out, the maximum effect of petitioner's evidence was merely to give rise to in-

fact and not a jury. *Cosmopolitan Shipping Co. v. McAlister*, 337 U. S. 783, 791-2. By the same token the Government has consented to review of an admiralty court's findings only under the traditional and accepted admiralty standards for review and not under traditional standards for appellate review of jury verdicts. Compare *Galloway v. United States*, 319 U. S. 372, 388, rehearing denied, 320 U. S. 214.

consistent inferences as to the possible cause of his contracting the disease, without tending to prove any one of the possible factors as an actual cause (*supra*, pp. 10-11). In view of this state of petitioner's own proof, the court of appeals had no recourse but to hold as a matter of law that since, at most, any of several inferences was permissible from petitioner's evidence as to the cause of his contracting the disease, and most of them would not support a finding of causality, petitioner, having the burden of proof, must lose.*

* Petitioner cites (Pet. 16) *Wilkerson v. McCarthy*, 336 U. S. 53; *Tennant v. Peoria and P. U. Ry. Co.*, 321 U. S. 29; *Lavender v. Kurn*, 327 U. S. 645; and *Myers v. Reading Co.*, 331 U. S. 477, as being in conflict with the holding of this Court in *Pennsylvania R. R. Co. v. Chamberlain*, 288 U. S. 333 (*supra*, p. 14). Not only do none of those cases question or overrule the *Chamberlain* decision but also they deal with an entirely different problem. The *Chamberlain* line deals with the situation where proven or accepted facts yield inconsistent inferences all *equally* compatible with the facts. Petitioner's cases (and comparable authorities) deal with the different situations where (a) there is conflicting evidence or issues of credibility, in which case it is not the appellate court's function to disregard the facts accepted by the jury in favor of the conflicting facts and the inferences to be drawn from the conflicting evidence; or (b) the evidence is uncontroverted or accepted, and a fair-minded trier of fact could reasonably conclude that certain inferences were more probable than the others.

In the present case, we do not have a jury verdict and, viewing the petitioner's evidence alone, a fair-minded fact-finder would have to conclude that there were inconsistent inferences as to causation, all equally probable and equally consistent with petitioner's proof.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1954.